

**COMMENTS OF THE GENERAL ELECTRIC COMPANY
ON DRAFT NPDES PERMIT NO. MA0040231
FOR THE PITTSFIELD ECONOMIC DEVELOPMENT AUTHORITY'S
STORMWATER DISCHARGE TO SILVER LAKE,
PITTSFIELD, MASSACHUSETTS**

June 4, 2015

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I. INTRODUCTION AND SUMMARY

A. Introduction

In 1999, the General Electric Company (GE), the U.S. Environmental Protection Agency (EPA), the Massachusetts Department of Environmental Protection (MassDEP), and other parties entered into a comprehensive Consent Decree (CD), approved by a federal court in 2000, to address environmental conditions at the former GE plant site, Silver Lake, and the Housatonic River and environs. The CD established specific cleanup standards for polychlorinated biphenyls (PCBs) in soils and groundwater on the former GE plant site, and the parties fully understood that cleanup to those standards would allow residual levels of PCBs to remain in the soil where they would come into contact with stormwater, as well as in groundwater in the area. EPA and MassDEP determined that achievement of those cleanup standards is fully protective of human health and the environment, and agreed that no further remedial work would be required – promises that were put into the CD in a series of binding covenants. GE subsequently transferred portions of its former plant site to the Pittsfield Economic Development Authority (PEDA). Prior to the transfer, GE completed everything required of it under the CD at those portions of the site, and EPA certified that the cleanup was complete and met all standards.

Now, in this proceeding, EPA in conjunction with MassDEP has proposed a stormwater discharge permit for PEDA that is premised on a revisionist determination – that the soil and groundwater cleanup standards are *not* protective of human health and the environment, because stormwater coming into contact with the soils can pick up trace levels of PCBs and groundwater might enter stormwater conveyances that discharge to Silver Lake. The proposed permit contradicts EPA's and MassDEP's clear pronouncement in the CD that the remediation is fully protective of human health and the environment, and would violate the covenants that are central to the agreement embodied in the CD.

Against this background, GE submits these comments on draft reissued National Pollutant Discharge Elimination System (NPDES) permit no. MA0040231 issued by EPA jointly with MassDEP in early April 2015 for public comment. This draft permit under the federal Clean Water Act (CWA) and the comparable state law would cover the discharge of stormwater by PEDA from a water quality basin on its property – part of the former GE plant site known as the 30s Complex – to Silver Lake in Pittsfield, Massachusetts through Outfall 001. The draft permit would impose an effluent limitation for PCBs of 0.000064 micrograms per liter (µg/L), based on EPA's health-based national ambient water quality criterion at the same level. However, recognizing that that limitation is several orders of magnitude below detection capabilities with current analytical methods, it would establish a PCB compliance level at the minimum level (ML) of analysis, based on the lowest level for reliable measurement of PCBs, which must be no higher than 0.022 µg/L.

EPA has not identified any known technology that would allow achievement of the proposed PCB effluent limitation of 0.000064 µg/L; and as noted above, it recognizes that that level cannot be reliably measured. At a minimum, to ensure compliance with the proposed permit,

PEDA would need to construct a large-scale carbon-based water treatment plant and operate it continuously for an indefinite period. While EPA describes an alternative approach of using Best Management Practices (BMPs), instead of a numerical effluent limit, to address PCBs in stormwater, it has not proposed to allow PEDA to use that approach.

B. Summary

This draft permit conflicts with the comprehensive agreement that was reached by EPA, MassDEP, GE, PEDA, and others in 1999 for cleanup of the former GE plant site in Pittsfield (which now contains the PEDA property) and adjacent areas, including Silver Lake. That agreement was embodied in the CD for the GE-Pittsfield/Housatonic River Site (the Site), which was entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) and was approved by the federal district court in 2000.

The CD established a set of cleanup performance standards for soil and groundwater, as well as for Silver Lake, and required the implementation of a series of cleanup actions to achieve those standards. Those standards did not require the removal of all PCBs from the areas addressed, but allow specified levels of PCBs to remain in both soil and groundwater, which could thus be discharged to Silver Lake. Nevertheless, the parties determined, and EPA and MassDEP explicitly stated in the CD, that achievement of those standards would be fully protective of human health and the environment. Moreover, both EPA and MassDEP agreed in the CD that, if the cleanup actions attained those standards, those Agencies would not require GE to conduct additional actions to address the residual PCB levels, unless the Agencies showed that there was new information demonstrating that the cleanup was no longer protective. EPA later extended that same agreement to PEDA in a prospective purchaser agreement (PPA).

All applicable cleanup performance standards under the CD have been achieved in the PEDA areas at the former GE plant site, as well as in Silver Lake. The PCB levels in PEDA's stormwater discharge are what would be expected given the residual PCB levels in the soils and groundwater that are allowed by the CD standards. However, EPA is now attempting, through the draft NPDES permit, to circumvent its prior determination and agreement by requiring PEDA to perform additional actions to address the very same PCB levels that it previously determined were protective. In other words, it is attempting to use the NPDES process under the CWA to change the rules that it previously agreed to.

EPA claims that it has no choice but to issue the NPDES permit with the specified effluent limitations. That is not the case. EPA previously agreed that, if the CD performance standards were met, it would not use the CWA to require additional actions to address the residual PCB levels allowed by those standards. Moreover, under the CWA, there are at least three different administrative mechanisms available to EPA to issue the permit without violating its prior agreement. First, EPA could conduct a use attainability analysis to "right-grade" the water quality standards for Silver Lake, consistent with the determinations that EPA has already made in the CD. Second, EPA could grant PEDA a variance from the currently applicable water

quality standards, subject to periodic review and revision. Third, EPA could impose non-numerical water quality-based effluent limitations in the form of BMPs in lieu of the currently proposed numerical limits, again subject to periodic review and revision. Each of these mechanisms is allowable under the CWA and each provides EPA with the "choice" that it claims not to have.¹

II. CONFLICT WITH CONSENT DECREE AND AGREEMENT WITH PEDA

EPA's and MassDEP's issuance of the draft permit to PEDA in its current form would conflict with the CD for the Site, to which EPA, MassDEP, GE, and PEDA are all parties, as well as with the separate agreement between EPA and PEDA extending the CD covenants to PEDA. As such, it would be unlawful.

In its Fact Sheet for the draft PEDA permit (p. 6), EPA argued against this position, broadly stating that the NPDES program under the CWA, which governs the discharge of pollutants into surface waters, "serves a different statutory purpose from CERCLA and RCRA cleanup programs," which govern the cleanup of contaminants that have already been released or for which there is a threat of release. Thus, EPA asserted that "[n]othing in [the CD] limits EPA's authority to issue an NPDES permit consistent with the CWA or to impose limitations on discharges authorized by the permit" (*id.*). As shown below, this argument is plainly incorrect.

A. The Draft Permit Conflicts with the Consent Decree.

The CD represents a comprehensive agreement among the parties to address PCBs and other contaminants present at the Site, including releases to surface waters at the Site, and contains a determination, approved by the federal district court, that the actions required to do so will protect human health and the environment. Based on an understanding of the conditions at the Site, including discharges to surface waters, the CD specified a set of Performance Standards for soil, sediment, and groundwater and required the implementation of a series of response actions to achieve those Performance Standards. Those response actions included Removal Actions for the PEDA areas (which include the former 30s, 20s, and 40s Complexes and the western portion of East Street Area 2-North) and the Silver Lake Area (including the Lake itself). (See map provided as Figure 2-1 to *Statement of Work for Removal Actions Outside the River* [SOW; Appendix E to CD].) (The relevant provisions of the CD and the SOW cited herein are included in Exhibit A.)

1. The Agencies' protectiveness determination

Paragraph 8.b of the CD contains a determination by EPA and MassDEP that the Removal Actions under the CD, once completed (including achievement of the Performance Standards), "are protective of human health and the environment with respect to the areas addressed by those Removal Actions," and that, "[e]xcept as expressly provided in [the CD], no further

¹ In addition, as discussed in Section IV of these comments, GE questions whether PEDA is subject to the NPDES permit program at all given that its current operations do not fall into any of the categories of activities specified in EPA regulations as requiring a stormwater permit.

response actions for the areas addressed by such Removal Actions are necessary to protect human health and the environment.” (The exception mentioned in this provision refers to the covenant “reopener” provisions, described in Section II.B.1 below, allowing EPA to require further response actions if there is new information or conditions indicating that a response action under the CD is no longer protective of human health or the environment [CD ¶¶ 162-163].)

2. Completion of CD response actions and achievement of Performance Standards

The areas owned by PEDAs from which the PCBs in its stormwater discharge originate have met the applicable CD requirements, including achievement of the Performance Standards. The soils in those areas, including the former 30s Complex, were evaluated under the applicable CD Performance Standards. Those evaluations demonstrated that, following remediation (where required), the same soils that contact the stormwater discharged to Silver Lake met the Performance Standards previously determined by EPA and MassDEP to be protective. In fact, EPA issued Certificates of Completion for the 30s Complex and the other PEDA areas, stating that those Removal Actions were completed and that the Performance Standards were met, before those areas were transferred to PEDAs (copies included in Exhibit B).

The Performance Standards plainly authorize certain residual levels of PCBs to be left in the soil, which could thus be present in discharges to Silver Lake. For example, the PCB Performance Standard for surface soil in commercial/industrial areas, such as the PEDA areas, is an average of 25 parts per million (ppm) (CD ¶ 25.a(iii); SOW at p. 26). It is clear, based on information that was available at the time the CD was executed, that that soil Performance Standard, which EPA and MassDEP agreed was fully protective, allows stormwater contacting such soil to have PCB concentrations far higher than the proposed NPDES effluent limitation of 0.000064 µg/L or the proposed compliance level of 0.022 µg/L. As an illustration, as shown in Exhibit C, based on the median concentration of total suspended solids (TSS) in urban runoff at commercial and mixed land-use sites (approximately 70 mg/L) as reported in a comprehensive EPA study conducted in 1979-1983, soils containing an average PCB concentration of 25 ppm would be expected to produce PCB concentrations of approximately 1.8 µg/L in stormwater.

In addition, the groundwater in the subject area, which EPA claims infiltrates into PEDAs's stormwater collection systems and its water quality basin and thus (according to EPA) contributes to PCBs in the discharge from Outfall 001 (EPA Fact Sheet at p. 20), is subject to regulation under the CD as part of Groundwater Management Area (GMA) 1. The Performance Standard for that groundwater, insofar as it relates to discharges to surface water, is achievement of the Massachusetts Contingency Plan (MCP) Method 1 GW-3 groundwater standards (which have been developed to prevent adverse impacts on surface water) in perimeter monitoring wells (SOW at p. 82). Based on groundwater monitoring, all groundwater in this area has met the MCP Method 1 GW-3 standards for years,² and thus, under the CD standards, is not adversely affecting the surface water into which it discharges. Moreover,

² See GE's *Baseline Assessment Final Report and Long-Term Monitoring Program Proposal for Groundwater Management Area 1* (ARCADIS, July 2014), at pp.36-38 & Table 8 at pp. 1-3 & 6-7 (copies provided in Exhibit D).

PEDA submitted its plans for its water quality basin to both EPA and MassDEP, and MassDEP approved those plans through conditional approval letters dated April 7, 2009 and September 3, 2009 (copies provided in Exhibit E).

The area that receives PEDA's stormwater discharge has likewise been remediated in accordance with the CD. Specifically, the Silver Lake Area Removal Action was completed in December 2013 and the Performance Standards have been met. A Final Completion Report for that Removal Action (reflecting comments from EPA) was submitted to EPA on May 20, 2015.

Since both the source area(s) and the receiving area for the PEDA discharge have met the applicable Performance Standards under the CD, they are covered by the CD determination in Paragraph 8.b that those areas are in a condition that is protective of human health and the environment (i.e., that the residual PCBs in those areas do not pose a danger to health or the environment), and that no further response actions are necessary to address those areas.

3. EPA's impermissible attempt to require additional response actions through NPDES permit

EPA's effort to distinguish the NPDES program from the CERCLA and RCRA cleanup programs on the ground that the former regulates discharges to surface waters while the latter addresses cleanup of contaminants misses the point. While the CD does not preclude EPA from issuing or re-issuing an NPDES permit to PEDA, it does reflect the determination by EPA and MassDEP that, if the CD response actions are implemented, no additional response actions would be required to address the existing contamination at the Site, even if imposed through another mechanism such as an NPDES permit.

At the time of execution of the CD, the parties were well aware of the various potential sources of the PCBs that could be discharged from upland areas to the receiving waters, including PCBs in soils, on other surfaces, in groundwater, and in stormwater collection and piping systems. The Agencies nevertheless determined that, if the Removal Actions prescribed by the CD to address soil, sediment, and groundwater were carried out in accordance with the CD and achieved the specified Performance Standards (which clearly contemplated the presence of residual PCBs), they would be protective of "**the areas addressed** by those Removal Actions," and that no additional response actions would be necessary for those "**areas**" (CD ¶ 8.b; emphases added). While the effluent limitations in an NPDES permit do not directly regulate soil, sediment, or groundwater contamination, compliance with those limitations in the draft PEDA permit would require additional response actions in **areas addressed** by the Removal Actions and directed to the same historical PCB contamination addressed by those Removal Actions.

There is no question that the actions that PEDA would need to take to meet the permit's effluent limitation on PCBs constitute response actions as defined in CERCLA. Under CERCLA, response actions include both removal actions and remedial actions (CERCLA § 101(25)). The statutory definition of remedial action expressly includes "onsite treatment" (CERCLA § 101(24)), such as the water treatment plant that would be necessary to ensure compliance with

the proposed effluent limitation. Moreover, if PEDAs were required to take other actions to meet that limitation, the purpose of such actions would be to "prevent or minimize the release" of PCBs to Silver Lake in excess of EPA's health-based national ambient water quality criterion, which would plainly fall within the definitions of remedial as well as removal actions.³ Paragraph 8.b contains a determination that such additional response actions are not necessary in the Removal Action areas.

It is irrelevant to the current issue that the CD does not expressly preclude the need for an NPDES permit and even recognizes the existence of GE's then-current NPDES permit. The issue here relates to the **substance** of a new permit and what would be required to comply with it. Where a new permit would require additional response actions to address an area where the CD Performance Standards have been met, that requirement cannot be reconciled with the Agencies' determination in the CD that no such requirements are necessary to protect health or the environment and that hence no such requirements would be imposed. The CD was meant to define the response actions that would be protective, and to prescribe the limited circumstances (reopeners) in which EPA or MassDEP might direct further response actions. The Agencies' use of an NPDES permit to require additional response actions would constitute an impermissible end run around the repose granted by the CD.⁴

EPA has indicated that it has no choice but to include such an effluent limitation in PEDAs' reissued NPDES permit. The chief of the EPA Region 1 water permit branch has been quoted as saying: "What's in the permit are the limits and standards for safe levels for PCBs. . . . They are just handed to me. They are very stringent standards" (*Berkshire Eagle*, "Pittsfield Economic Development Authority wary of tough new standards for Silver Lake stormwater," April 28, 2015.) However, the CD already defines "safe levels for PCBs," and EPA's rationale does not justify inclusion of provisions in the permit that would require implementation of response actions that the Agency has previously agreed are not necessary to protect health or the environment. In fact, as discussed further in Section III below, EPA has other available options under the CWA – e.g., conducting a use attainability analysis for Silver Lake, granting a variance to PEDAs, or reissuing an NPDES permit that relies on BMPs rather than numerical effluent limitations.

³ Removal actions include any "actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release" of a hazardous substance (CERCLA § 101(23)). Remedial actions mean actions, consistent with a permanent remedy, "to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment" (CERCLA § 101(24)).

⁴ EPA's suggests in its Fact Sheet (p. 6) that the **only** way that a discharge to surface water may be authorized is through an NPDES permit under the CWA, and that thus "[n]othing in [the CD] limits EPA's authority . . . to impose limitations on discharges" through such a permit. This assertion ignores the fact that the **CD** authorizes residual levels of PCBs that result in stormwater containing PCB concentrations far higher than the proposed NPDES effluent limits.

4. Other supporting CD provisions

Other provisions of the CD and the accompanying SOW (Appendix E to CD) further support the conclusion that the CD parties intended that no additional response actions beyond those specified in the CD would be required at the Site to address contamination resulting from NPDES-permitted discharges or exceedances of the national ambient water quality criteria (which are not Performance Standards under the CD).

a. Silver Lake Performance Standard. The SOW contains a Performance Standard that specifically addresses discharges into Silver Lake. That Performance Standard requires GE to conduct periodic sampling of the cap that GE has installed across Silver Lake; and it provides that if that sampling indicates the deposition of PCBs on the surface of the cap, "GE shall evaluate, to the extent practical, whether such PCBs are attributable to **sources other than erosion of surface runoff from the banks or currently known discharges of PCBs into the lake from NPDES-permitted [or] other outfalls**" (SOW at p. 77; emphases added). If the surface PCBs cannot be attributed to such other sources on GE property (e.g., to the extent that the PCBs are attributable to NPDES-permitted outfalls), "no further response actions shall be required to address such deposition on the surface of the cap," except as otherwise required by the CD to address erosion or emergencies or by the CD covenant "reopeners" (*id.*).

This Performance Standard demonstrates the parties' recognition that NPDES-permitted discharges to Silver Lake would continue to contribute PCBs to the lake, and that if such discharges caused PCB deposition on the surface of the cap, no further response actions would be required to address them (except in circumstances not present here). While the draft NPDES permit does not specifically address the redeposition of PCBs on the surface of the Silver Lake cap, it would impose limitations on discharges to Silver Lake that would require PEDA to implement additional response actions on its property, as shown above. As an example, given this Performance Standard's specification that EPA cannot (unless it triggers the reopeners) use its CERCLA authority to compel response actions to address PCB discharges to the Lake that cause redeposition, it is clear that EPA could not achieve the same result under an NPDES permit. The same rationale applies to efforts to compel response actions to address other impacts in Silver Lake (e.g., exceedances of the national ambient water quality criteria), particularly when such impacts would be expected given the residual PCB levels allowed by the CD. Thus, this Performance Standard provides further evidence of the CD parties' intent that no additional response actions would be required to address contamination resulting from NPDES-permitted discharges.

b. ARARs table. The table included in the SOW specifying the applicable or relevant and appropriate requirements (ARARs) for the Removal Actions covered by the SOW identifies the federal and state ambient water quality criteria as ARARs, and provides that, "[i]f these criteria are not attained in surface waters at or adjacent to the Removal Action Areas, no further response actions to attain the criteria shall be required as part of these Removal Actions (beyond the actions described in the SOW), because EPA has determined that such further response actions are not practicable as part of these Removal Actions" (SOW Attachment B, Table 1 at p. 1). This provision reflects the parties' recognition that these water quality criteria

may not be met in the surface waters at the Site (including Silver Lake), and their determination that no further response actions would be required to attain those criteria.⁵ Thus, this language is another reflection of the overall determination, embodied in CD Paragraph 8.b, that the CD Removal Actions and achievement of their Performance Standards are protective for the areas subject to them (regardless of whether they attain other criteria), and that no additional response actions would be required for those areas.

B. Issuance of the Draft Permit Would Violate the PPA Covenants.

1. Description of covenants

In the CD, the United States covenanted not to sue or take administrative action against GE under numerous federal laws to require GE to implement or fund additional response actions or similar measures, beyond those required by the CD, to address waste materials at the Site, unless specified "reopener" conditions are met – i.e., that there is new information or conditions and EPA determines that such new information or conditions, together with other relevant information, indicate that a Removal Action or other response action under the CD is no longer protective of human health or the environment (CD ¶¶ 161-163). The listed federal-law provisions include Section 309 of the CWA, which is the source of EPA's authority to enforce the NPDES provisions of that statute, including the limitations in an NPDES permit.

EPA extended the same covenants to PEDDA in a Prospective Purchaser Agreement (PPA), formally called "Agreement and Covenant Not To Sue," effective January 3, 2002 and amended on February 21, 2012 (copy provided in Exhibit G). The PPA noted that, because PEDDA was acquiring properties at the same Site for which GE had received covenants, it was appropriate to provide PEDDA with similar covenants (PPA ¶ 6). In the public notice soliciting comments on the proposed PPA, EPA stated that "[u]nder the Proposed Agreement, the United States grants a Covenant Not to Sue to the Purchaser under provisions of CERCLA, the Resource Conservation and Recovery Act, the Oil Pollution Act, *the Clean Water Act*, the Toxic Substances Control Act, and the Rivers and Harbors Act, with respect to existing contamination at the Site" (67 Fed. Reg. 3706-3707, Jan. 25, 2002; emphasis added).

The PPA provides that, so long as PEDDA abides by certain post-remediation obligations, the United States "covenants not to sue or take any other civil or administrative action against [PEDDA] for any and all civil liability for injunctive relief" with respect to "Existing Contamination" under a broad list of federal environmental laws, including Section 309 of the CWA (PPA ¶ 26), subject to certain reservations of rights (*id.* ¶ 27). "Existing Contamination" is defined to include

⁵ The health-based national ambient water quality criterion listed in that table was the then-existing criterion of 0.00017 µg/L. The current national ambient water quality criterion of 0.000064 µg/L is even lower and thus even more unlikely to be attained. Indeed, EPA has continued to recognize that attainment of that criterion is not feasible in Massachusetts. In its draft modification of the Reissued RCRA Permit for the Rest of River portion of the Site, issued on May 30, 2014, EPA has proposed to waive the water quality criterion of 0.000064 µg/L in Massachusetts as an ARAR for the proposed remedy on the ground that achievement of this standard is "technically impracticable" (Draft Permit, Attachment C, at p. 1; Statement of Basis at p. 29; excerpts provided in Exhibit F).

any hazardous substances “present or existing on or under the Property” transferred to PEDA as of the effective date of the Agreement, as well as any such substances “presently at the Site that migrate onto or under or from the [PEDA] Property” after the effective date (*id.* ¶ 10(F)).⁶

2. Violation of covenants

Based on available information, the PCB contamination that would cause exceedances of the PCB effluent limit in the draft PEDA permit and would thus have to be addressed to meet that limit is part of “Existing Contamination,” because those PCBs were present on the PEDA property as of the effective date of the PPA. As a result, EPA is precluded by the covenants in the PPA from requiring PEDA to conduct additional response actions to address that contamination – which the draft permit would do.⁷

It is clear that the purpose of the covenants in both the CD and the PPA is to prevent EPA from using CERCLA or RCRA **or any other federal statute** to require GE or, in this case, PEDA to implement or fund additional response actions at the Site beyond those required by the CD. That is why the covenants contain a broad list of statutory provisions that EPA could potentially rely upon to issue such requirements.

For the CWA, the covenants list the various provisions that could give EPA the authority to require response actions. These include Section 309, which provides, *inter alia*, that whenever EPA finds that a person is in violation of various CWA sections, including Section 301 (prohibiting discharges without a permit), or of any condition or limitation of a permit issued under Section 402 (authorizing NPDES permits), it shall issue an order requiring such compliance or bring a civil action to compel such compliance (CWA § 309(a)(3)). Thus, in the event that PEDA did not conduct the necessary actions to meet the effluent limits in its NPDES permit, EPA would need to rely upon Section 309 to compel such compliance. Such an action would fall squarely within the covenants’ prohibition on civil or administrative actions for injunctive relief. In short, there was no need to list Sections 301 and 402 separately; the reference to Section 309 (which provides for enforcement of those provisions) prohibits EPA from using CWA authorities, including the mechanism of an NPDES permit, to require further response actions.⁸ Accordingly, the issuance of a permit that would compel the permittee to take such actions would likewise run afoul of the covenants.

⁶ The February 2012 Amendment to the PPA extended the covenants to certain parcels along Silver Lake that PEDA planned to acquire (and has since acquired), but made no substantive changes to the covenants.

⁷ EPA’s reservations of rights in the PPA exclude from the covenants PEDA’s liability resulting from hazardous substance releases “caused or contributed to” by PEDA or from PEDA’s “exacerbation” of Existing Contamination (PPA ¶ 27(b), (c)). However, EPA has not claimed in the draft NPDES Permit or Fact Sheet or elsewhere that either of these conditions is present here.

⁸ The covenants follow a similar approach for RCRA, for example. They do not specifically cite the provision of RCRA that authorizes EPA to issue permits for treatment, storage, and disposal (TSD) facilities (RCRA § 3005); but they do list the provision that authorizes EPA to enforce the requirements of such a permit (RCRA § 3008) (see PPA ¶ 26.b, following CD ¶ 161.b). Thus, as with the CWA, the

III. ALTERNATIVE APPROACHES UNDER THE CLEAN WATER ACT

As described above, EPA has already determined that Silver Lake may never achieve the water quality criterion of 0.000064 µg/L, even if this value could be reliably measured. Yet the Agency's water program seems to think that it has no choice but to impose effluent limits based on this criterion. Under EPA's approach, PEDDA will be forced to make a Hobson's choice between trying to meet limits that may not be achievable at all and/or would require prohibitively costly response actions that violate the very covenants that EPA provided, or else face the risk of chronic noncompliance with its NPDES permit. The water program says that its hands are tied, but this is not the case. There are at least three options under the CWA that could avoid a direct conflict with the CD.

First, EPA could conduct a use attainability analysis (UAA) to "right-grade" the water quality standards for Silver Lake, consistent with the determinations that EPA has already made in connection with the CD. Recognizing that legitimate factors might prevent a use from being met, EPA issued regulations in 1983 that identify six scenarios where use attainment is not feasible and, in turn, authorize EPA or the state to remove or adjust (i.e., "right-grade") the use and corresponding water quality criteria.⁹ At least one of those scenarios would apply here. Scenario (3) applies to situations where Human-caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place.. Much of the structured scientific assessment of the factors affecting use attainment under Scenario (3) has already been conducted under the CD and should be directly transferrable to the water program for purposes of a UAA.

We recognize that the UAA process may take a year or more to complete, and will involve close coordination between EPA and MassDEP. Despite the time involved, there is nothing preventing EPA from administratively continuing the existing PEDDA permit (as it has done to date) until after the UAA is complete. Only then will EPA be in a position to establish permit limits that are both necessary and achievable.

Alternatively, EPA could grant PEDDA a variance from the need to achieve the 0.000064 µg/L criterion. EPA has a long history of granting variances (and approving state-granted variances) using the same factors as for a UAA, but on a time-limited and source- or waterbody-specific basis. Indeed, EPA has just finalized a set of targeted revisions to its water quality standards regulation that will provide additional specificity on the development and use of variances.¹⁰ If EPA has any reservations about pursuing a *permanent* change in standards using a UAA, then a variance would serve as the next best option, giving PEDDA temporary relief from the 0.000064 µg/L criterion while still requiring interim performance measures that reflect the highest attainable condition of Silver Lake. This approach would be consistent with EPA's prior

covenants would preclude EPA from using a RCRA TSD permit to require additional response actions at the Site.

⁹ See 48 Fed. Reg. 51400, 51407 (November 8, 1983) (codified at 40 CFR § 131.10(g)).

¹⁰ EPA's final rule was submitted to the Office of Management and Budget on January 8, 2015, but has not yet been published in the *Federal Register*.

determination in the CD to waive the comparable water quality criterion as an ARAR for the Removal Actions on the ground that actions to attain that criterion are not practicable. It would also be consistent with EPA's proposal to waive the 0.000064 µg/L criterion as an ARAR in Massachusetts for the proposed Rest of River remedy on the ground that that criterion is "technically impracticable" to achieve (see note 5 above).

Finally, EPA could require BMPs in lieu of numerical end-of-pipe effluent limits. While EPA has mapped out an "Alternative BMP Approach" in the Fact Sheet, it has not proposed that approach. However, that approach could be appropriate here. Due to the practical difficulties associated with regulating stormwater runoff (e.g., inherent variability and intermittent volume), EPA has for many years adhered to a permitting policy that relies on BMPs in lieu of numerical limits to protect water quality.¹¹ This policy is predicated on EPA's recognition that numerical limits on stormwater are not necessary or, in many cases, feasible. Indeed, EPA's regulations specifically authorize use of BMPs where numerical limits are infeasible (40 CFR § 122.44(k)(3)). All of EPA's model general permits (e.g., its Multi-Sector General Permit, Construction General Permit, and Municipal Separate Storm Sewer System [MS4] general permit) rely on BMPs in lieu of numerical limits, and most of EPA's individual stormwater permits do so as well. For the PEDA permit, BMPs present an established approach to water quality protection that can be implemented in an adaptive manner over the course of successive permit terms, with or without a variance.

IV. APPLICABILITY OF THE NPDES PERMIT PROGRAM TO PEDA

Apart from GE's substantive comments on and concerns with the PEDA NPDES permit as drafted, GE continues to question whether PEDA is subject to the NPDES permit program in the first instance. PEDA's current operations do not involve any of the eleven categories of industrial activity set forth in 40 CFR § 122.26(b)(14) that require authorization under an NPDES industrial stormwater permit. Nor is PEDA considered a municipal separate storm sewer system (MS4) subject to 40 CFR § 122.26(a)(3). Moreover, the EPA Regional Administrator has not separately designated the PEDA discharge for NPDES permit coverage under 40 CFR

¹¹ EPA's permitting policy dates back to August 26, 1996, and has been updated in stormwater policy memos from November 22, 2002 and November 26, 2014. See *Interim Permitting Policy for Water Quality-Based Limitations in Stormwater Permits*, 61 Fed. Reg. 43761 (Aug. 26, 1996), as revised in 61 Fed. Reg. 57425 (Nov. 6, 1996), and extended to municipal separate storm sewer systems in EPA's Phase II stormwater rule, 64 Fed. Reg. 68753, 68737 (Dec. 8, 1999); EPA's November 22, 2002 Memorandum titled *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs*; and EPA's November 26, 2014 Memorandum titled *Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs."* These policy memos reinforce EPA's longstanding position that BMPs may be used in lieu of numerical limits in stormwater permits. The validity of the BMP approach has also been confirmed by case law. See, e.g., *In re: Arizona Municipal Stormwater NPDES Permits for City of Tucson, Pima County, City of Phoenix, City of Mesa, and City of Tempe*, NPDES Appeal No. 97-3 (EAB 1998) (upholding decision not to impose numerical limits on grounds of infeasibility, in particular due to the unique nature of stormwater discharges) (subsequently appealed and decided on other grounds).

§§ 122.26(a)(1)(v) or 122.26(a)(9)(i)(C) or (D). Thus, PEDAs stormwater discharge appears to fall outside the scope of EPA's NPDES permit program.

V. CONCLUSION

For the reasons given above, GE believes that EPA and MassDEP should withdraw the current draft permit and take steps that are consistent with their agreements in the CD and PPA.